



VIA email

April 12, 2019

U.S. EPA Freedom of Information Officer
Region 5
77 W. Jackson Blvd.
Chicago, Illinois, 60604-3507
r5foia@epa.gov

RE: Freedom of Information Act request – Records since 2012 regarding Facility Response Plans for the Chicago Region and the Superior Region for pipelines of Enbridge Energy required under the Oil Pollution Act

Dear FOIA Officer:

On behalf of the Sierra Club, I am writing to request that the U.S. Environmental Protection Agency (“U.S. EPA”) provide copies of the records described below pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the U.S. EPA regulations at 40 C.F.R. § Subchapter A, Part 2. This request is sent to you because you were identified at 40 CFR §2.101 as the proper person to receive such requests. If this request should be directed at another person, please forward this request to that person.

Sierra Club is the nation’s oldest grassroots environmental organization. It has more than 2.7 million members and supporters nationwide. Sierra Club is dedicated to the protection and preservation of the natural and human environment. Sierra Club’s purpose is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

One of the Sierra Club’s main national initiatives, the Beyond Oil Campaign, tackles the pressing problems of global warming, air pollution, water pollution, and our national dependence on destructive, non-renewable energy sources, like oil. A central goal of this initiative is decreasing the destructive impact of tar sands extraction and refining, and educating the public on foreign and domestic tar sands projects and other oil and gas extraction. This FOIA request is part of this initiative.

Sierra Club is a leading non-governmental organization seeking to educate and mobilize the public on issues of climate change, fossil fuel energy, clean energy and protection of water resources and venerable communities. The Club has been conducting multiple public campaigns around these issues, including its Dirty Fuels Campaign, Clean Drinking Water Campaign and Great Lakes Program. This request is made on behalf of those campaigns, as well as the organization's long-standing interest in government accountability and transparency

Sierra Club Requests the Following Records:¹

Documents from 2012 or thereafter relating to the Enbridge Energy Facility Response Plans for the Chicago Region and/or the Superior Region, required under the Oil Pollution Act, including:

1. Final and draft facility response plans for the Chicago and Superior Regions;
2. Comments by employees of the U.S. Environmental Protection Agency, the Pipeline and Hazardous Materials Safety Administration (PHMSA) and other federal officials on draft or final Enbridge Energy Response plans;
3. Responses by Enbridge Energy to comments on draft or final facility response plans by employees of U.S. EPA, PHMSA or other federal agencies.

Duty to Preserve Records

U.S. EPA must preserve all of the records requested herein while this FOIA is pending or under appeal. U.S. EPA shall not destroy any records "while they are the subject of a pending request, appeal, or civil action under the FOIA." 7 C.F.R. § 1.24; *see Chambers v. U.S. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("an agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act").

If any of the requested records are destroyed, the agency and responsible officials are subject to attorney fee awards and sanctions, including fines and disciplinary action. Indeed, a court has held EPA in contempt for "contumacious conduct" and ordered the agency to pay plaintiff's costs and fees for destroying "potentially responsive material contained on hard drives and email backup tapes." *Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59, 62 (D.D.C. 2003); *see also Judicial Watch, Inc. v. Dep't of Commerce*, 384 F. Supp. 2d 163, 169 (D.D.C. 2005) (awarding attorneys' fees and costs because, among other factors, agency's "initial search was

¹ "Records" means information of any kind, including writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, telephone conversations, telefaxes, e-mails, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described below at any stage of development, whether proposed, draft, pending, interim, final or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of U.S. EPA, and all its Offices, Regions and other subdivisions.

unlawful and egregiously mishandled and ...likely responsive documents were destroyed and removed”), *aff’d in relevant part*, 470 F.3d 363, 375 (D.C. Cir. 2006) (remanding in part to recalculate attorney fees assessed). In another case, in addition to imposing a \$10,000 fine and awarding attorneys’ fees and costs, the court found that an Assistant United States Attorney prematurely “destroyed records responsive to [the] FOIA request while [the FOIA] litigation was pending” and referred him to the Department of Justice’s Office of Professional Responsibility. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 6 (D.D.C. 2000).

Exempt Records

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below.

Fee Waiver Request

We respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 7 C.F.R. § 1.5. The Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and have routinely received fee waivers under FOIA.

The Sierra Club is a nonprofit environmental organization with no commercial interest in obtaining the requested information. Instead, the Sierra Club intends to maintain public websites containing the requested information, so the public can access this important information regarding pollution in their communities.

As explained below, this FOIA request satisfies the factors listed in U.S. EPA’s governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

The requested records relate to activities that are unquestionably “identifiable operations or activities of the government.” The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by a federal agency will meet this threshold” of identifiable operations or activities of the government.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The FOIA Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in part on whether the requested documents provide information that is not already in the public domain. First, the scope and quality of U.S. EPA’s review of facility response plans is unknown to the public. Further, review of comments by federal officials on the draft and final response plans may disclose flaws in the plans that were adopted and potential threats to public health and drinking water supplies that were not properly address by the plans. The requested information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

The Sierra Club and its their members have long-standing experience and expertise in the subject area of FOIA requests, specifically issues related to energy production, Great Lakes water quality, drinking water supplies, public safety, and the Clean Water Act. Sierra Club also has a long-standing interest in government accountability and transparency and proper enforcement of federal environmental laws.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on website, emailing and list serve distribution to the organizations’ members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. Sierra Club Insider, an electronic newsletter, is sent to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. In the past, the Sierra Club has published, posted, and disseminated numerous stories on coal and coal power plants, regarding their impacts on health, the

environment and alternative energy. This includes information on various webpages, such as the Sierra Club's [Clean Energies Solutions](#) portal, webpages and press releases.²

Sierra Club intends to share the information received from this FOIA request with the public.

Sierra Club unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

The records requested will contribute to the public understanding of the U.S. EPA’s “operations and activities,” as the requested records include U.S. EPA databases. The disclosure of the requested records is essential to the public’s understanding of U.S. EPA’s operations and activities, U.S. EPA oversight of the pipeline regulation program, the soundness of EPA’s oversight of Response Plans and the level of protection provided by the facility response plans. After disclosure of these records, the public understanding of U.S. EPA’s activities and the level of protection afforded by the facility response plans will be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Sierra Club has no commercial interest in the requested records. Nor do they have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club is a tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of the mission of the organization to inform the public on matters of vital importance to the environment and public health.

6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it

² For example, the Sierra Club sought information about coal export and permitting activities in Oregon via a state public records act request at the Port of Coos Bay. All correspondence is published online and has received extensive media attention from press releases on the subject. *See* <http://content.sierraclub.org/environmentallaw/lawsuit/2013/sierra-club-challenges-dirty-and-dangerous-fossil-fuel-exports-oregon>.

to the “public interest” in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, the Sierra Club has no commercial interest in the requested records. Disclosure of this information is not “primarily” in the organizations' commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of U.S. EPA’s activities.

Because the public will be the primary beneficiary of this requested information, the Sierra Club respectfully requests, that U.S. EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A) and 7 C.F.R. § 1.5. In the event that your agency denies a fee waiver, please send a written explanation for the denial. Also, please continue to produce the records as expeditiously as possible, but in any event no later than the applicable FOIA deadlines.

Record Delivery

In responding to this request, please comply with all relevant deadlines and other obligations set forth in FOIA and the agency’s regulations. 5 U.S.C. § 552(a)(6)(A)(i); 7 C.F.R. § 1.7. Please produce the records above by sending them to me at the address listed below. Please produce them on a rolling basis; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce.

Sierra Club requests that all records be produced in a format that can easily be downloaded in bulk.

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to call me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply. I can be reached at 773.818.4825 or by e-mail at Ettinger.Albert@gmail.com.



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